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No. 07-304

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In The
Supreme Court of the United States

STRYKER CORPORATION, STRYKER SALES CORPORATION, HOWMEDICA OSTEONICS CORPORATION, and STRYKER ORTHOPAEDICS,

Petitioners,

v.

ACUMED LLC,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether Petitioners, Stryker Corporation, Stryker Sales Corporation, Stryker Orthopaedics and Howmedica Osteonics Corporation (collectively "Stryker") have presented compelling reasons to grant the Petition where the Federal Circuit's claim construction does not conflict with a decision of this Court or the Federal Circuit, and exclusively relies on the intrinsic record.

2. Whether Stryker has presented compelling reasons to grant the Petition in light of *In re Seagate Technology, LLC*, Misc. Docket No. 830, ___ F.3d ___, 2007 U.S. App. LEXIS 19768 (Fed. Cir. August 20, 2007) (*en banc*), where: (1) the District Court on remand has found Stryker's conduct to be willful infringement under *Seagate*; (2) the jury instructions on willfulness were consistent with *Seagate*; (3) Stryker set out to eliminate Acumed from the proximal humeral nail market by infringing Acumed's patent; (4) Stryker copied Acumed's invention; and (5) two Stryker attorneys warned Stryker that its product would infringe Acumed's patent.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

The caption contains the names of all of the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Respondent Acumed LLC has the following parent corporation:

Colson Associates, Inc.

No publicly held company owns 10% or more of Acumed LLC.

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RESPONDENT'S OBJECTIONS TO PETITIONER'S PRESENTATION OF QUESTIONS FOR REVIEW

Stryker has presented two questions for this Court to consider on review:

> 1. Whether the public notice function of patents is vitiated by the Federal Circuit's panel-specific, unpredictable practice of choosing between two irreconcilable claim construction methodologies whereby patent claims are either (1) construed in accordance with the broadest available dictionary definition not expressly disavowed by the patent specification or (2) construed to have a scope commensurate with the embodiments disclosed in the specification where no other indications of breadth are affirmatively disclosed or taught in the specification.
>
> 2. Whether this case satisfies the requirements for an order of grant of certiorari, vacation of judgment, and remand to the Federal Circuit on the issue of willfulness, in view of the Federal Circuit's abolition of the 24-year-old standard of due care for willfulness in *In re Seagate Technology, LLC,* Misc. Docket No. 830, ___ F.3d ___, 2007 U.S. App. LEXIS 19768 (Fed. Cir. August 20, 2007) (*en banc*), wherein the present case was deemed close on the merits by both the district court and the Federal Circuit, and thus cannot meet the new "objectively reckless" willfulness standard.

Acumed objects to the first question in that it suggests that this case is emblematic of a purported conflict within the Federal Circuit; indeed, the construction in this case does not fall within either of the "irreconcilable methodologies" framed by Stryker. In construing the term in question – "transverse holes" – the Federal Circuit did not consider any "dictionary definitions"; instead, it exclusively relied on the intrinsic record. The intrinsic record supports that construction in three ways. First, the preferred embodiment itself discloses two different kinds of holes: (1) holes extending across the butt portion, which the inventors called "transverse holes", and (2) a hole extending axially through the butt portion, which the inventors called "an axial bore." Second, the inventors expressly qualified the "transverse holes" in the preferred embodiment as being "perpendicular." Third, under the doctrine of claim differentiation, limiting the "transverse holes" in claim 1 of the '444 patent to perpendicular holes would render dependent claim 15 meaningless. Hence, "other indications of breadth are affirmatively disclosed or taught" in the intrinsic record, placing this case outside of the two hypotheticals posed in Stryker's question.

Acumed objects to the second question because it is premised on the contention, made elsewhere in Stryker's brief, that "the now defunct duty of care was applied in determining willful infringement." In actuality, the willfulness jury instruction was consistent with the *Seagate* holding, and the District Court has since held that Stryker's conduct constituted

willful infringement under *Seagate*. Moreover, the record established that after Stryker's effort to acquire Acumed failed, Stryker set out to eliminate Acumed from the proximal humeral nail market by infringing Acumed's patent. Two lawyers warned Stryker that its product would infringe Acumed's patent, and the jury and the District Court found that Stryker copied Acumed's invention.

I. STATEMENT OF THE CASE

A. Proximal Humeral Fractures And The Invention Of The '444 Patent

When Randall Huebner, one of the co-inventors of U.S. Patent No. 5,472,444 (the '444 patent), founded Acumed, his goal was to design products that addressed unsolved medical problems. Ct. App. JA 0344-45. Proximal humeral fractures were considered the last unsolved fracture because the existing treatments had problems which made them unsuitable or undesirable. Such treatments were invasive and prone to failure; they included percutaneous pinning, bone plates and shoulder replacement. Ct. App. JA 0346-48. In 1991, Messrs. Huebner and Conrad began designing an intermedullary nail to treat proximal humeral fractures. That effort presented unique treatment problems due to the anatomy of the proximal humerus, including the very soft and poor quality of the bone, the axillary nerve, which wraps around the proximal humerus, and the radial nerve, which

runs around the mid shaft of the humerus. Ct. App. JA 0348.

Eventually, Acumed conceived of a nail design that had two key features: a curved nail, which can be inserted into the proximal humeral shaft to provide a solid foundation for securing fractures of the proximal humerus. Ct. App. JA 0643-50. The shape also avoided damage to the cartilage and the rotator cuff. Ct. App. JA 0348.

The other key aspect, the angularly offset proximal hole configuration, allowed the nail to attach screws into the various bone fragments in either a two-, three- or four-part fracture. Ct. App. JA 0349. That configuration allowed divergent screws to be screwed into the bone fragments to improve stability and hold the ball fragments of the humeral head in place. Ct. App. JA 0349.

Acumed called its proximal humeral nail the "Polarus", and Huebner and Conrad filed for a patent application on May 13, 1994. Ct. App. JA 0651. The '444 patent issued on December 15, 1995. The Polarus nail was an immediate commercial success and helped build Acumed. Ct. App. JA 0355.

B. Stryker Enters The Market By Copying The '444 Patent

Stryker, the largest medical implant company in the world (Pet. App. 62a), recognized that it needed a product in what it called the "PHN [Proximal Humeral

Nail] market". Ct. App. JA 1011; ("We currently do not have an offering in the PHN market"). In 2002, eight years after the Polarus nail hit the market, Stryker unsuccessfully attempted to acquire Acumed. Ct. App. JA 0357. When that attempt failed, Stryker decided to launch its "curved nail design" to drive Acumed out of the market. In August of 2002, Stryker unveiled a plan to develop a proximal humeral nail in order to "attack competitors" (Ct. App. JA 1130), principally Acumed, which had achieved "market success" with a "patented design". Ct. App. JA 1131. In that same plan, Stryker circulated its proposed design for a "curved nail". Ct. App. JA 1137.

1. Two Stryker Attorneys Warn That The Planned Design Will Infringe The '444 Patent.

When Stryker's German attorney, Edo Graalfs, learned of the planned design, he immediately warned that it would infringe Acumed's '444 patent:

> ***[T]he Stryker Trauma nail has transverse bores having axes which are angularly offset. . . .***
>
> ***I advised that the nail must not be provided with a curvature as this is a feature of independent claim 1 [of the '444 patent]. Now it turned out that for business reasons it would be a requirement to also use a curved shank. I expressed my doubts*** [to Stryker] ***that it could be***

> ***possible to find a structure not covered by the mentioned US patent.***

Ct. App. JA 1480-81 (emphasis added). Weeks later, Stryker's U.S. patent attorney, Raymond Augustin, gave the same warning to Stryker:

> The [Stryker] humeral nail . . . has a curved shank. . . .
>
> Independent claim 1 [of the '444 patent] requires the humeral nail to have . . . a curved shank with a butt portion extending proximally from the shank with the butt portion being shorter than the shank and having at least three holes, each hole defining a hole axis with the ***axes angularly offset from each other.***
>
> ***[I]f the Stryker shank or nail were curved, the Stryker Trauma humeral nail would have each and every element of claim 1 in the '444 patent.*** Edo Graalfs has indicated in his letter that he suggested that the nail shank be straight, however, he indicated that ***for commercial reasons, the nail shank would be curved.***

Ct. App. JA 1490-92 (emphasis added). Both warnings concluded that the "transverse holes" element of the '444 patent was present in Stryker's product without any reference to "dictionary definitions." *Id.*

Stryker's lead engineer admitted that the design which prompted these warnings was the same design

which Stryker eventually launched. Ct. App. JA 0417 ("There were no changes to the shaft or to the holes").

2. Stryker Proceeds With "Curved" Nail With "Angularly Offset," "Transverse" Holes In Order To Drive Acumed Out Of The Market

Despite those warnings, in December of 2002, Stryker elected to proceed with the same design. Ct. App. JA 1309. Stryker even filed a patent application on its nail, repeatedly describing its nail as having "transverse bores" (Ct. App. JA 0917-23), even though such bores are both perpendicular and diagonal to the nail axis. Stryker also represented that such "transverse bores" are "angularly offset from each other." Ct. App. JA 0920.

The "business reason" why Stryker insisted on the infringing design was to drive Acumed out of the very market it created:

> The T2 PHN product line ***will be targeted for existing Polarus accounts.*** . . . The market leader in the PHN segment is the Polarus nail system by Accumed [sic]. . . . ***With the new design of the T2 PHN, we are looking to take approximately 75% of the Accumed [sic] business by the end of the first year in the market.***

Ct. App. JA 1011 (emphasis added). As Stryker declared: "Hopefully we can nearly eliminate the Polarus!!!" Ct. App. JA 1299.

The District Court found that "there is sufficient evidence to establish that ***defendants deliberately copied the Polarus nail***." Pet. App. 58a (emphasis added). The District Court also found:

> There is evidence in the record from which a rational juror could conclude Defendants set out on a deliberate course to eliminate their competition after Defendants were unable to buy Acumed outright. This evidence includes statements by Stryker that it planned to "attack competitors," to "eliminate the Polarus," and to "target existing Polarus accounts."

Pet. App. 64a. Stryker also had one of its paid surgeons steal a Polarus operating room chart out of a hospital in Ohio. Pet. App. 58a.

3. The Second Augustin Opinion And Stryker's Conduct Surrounding It

Faced with two unfavorable opinions, but needing the infringing product for "business reasons", Stryker requested another opinion from Augustin. In November of 2003, Augustin provided that opinion in which he purportedly changed his mind from his earlier opinion. Ct. App. JA 2721-40. In his new opinion, Augustin concluded that the Stryker nail has a "bent shank" and not a "curved shank." Ct. App. JA 2735. Yet three months earlier, Augustin filed Stryker's patent application in which Stryker stated that the claimed nail "may either be straight or curved." Ct. App. JA 0919. In that application, Stryker described the nail claimed in the '444 patent

as "bent." Ct. App. JA 0913; ("The nail shaft is also bent"). Mr. Augustin's opinion said nothing about the absence of "transverse holes".

In the course of obtaining the second Augustin opinion, Stryker's Director of Intellectual Property, Gregory Plaskon, made no effort to provide Augustin with any of the Stryker documents describing the "curved nail" design and the nail's "curvature." Ct. App. JA 0492. Plaskon also admitted that he didn't understand the opinion, yet he never bothered to ask Augustin about it. Ct. App. JA 0491-92; (Q: "Did you ask him anything about his legal opinions?" A: "No." Q: "Why not?" A: "I don't know").

Stryker also had finalized its infringing design before receiving the second Augustin opinion. Stryker filed its FDA application (Ct. App. JA 1149-75) for the T2 PHN in August of 2003 – three months before the second Augustin opinion.

Plaskon also testified that Stryker failed to take any measures at all to avoid infringing the '444 patent:

> Q: So to the best of your knowledge, did Stryker take any active measures to ensure that it did not design a nail that is covered by the '444 patent?
>
> A: To the best of my knowledge, no.

Ct. App. JA 0494.

C. Stryker Launches The T2 Nail; This Lawsuit Follows

Stryker introduced its infringing T2 proximal humeral nail to the U.S. market in early 2004; Acumed filed this lawsuit shortly thereafter.

1. The Jury Instruction On Willfulness

Contrary to Stryker's argument, the "now-defunct duty of care standard" was not applied. Instead, the jury was instructed:

> To prove willfulness, Acumed must persuade you that it is highly probable that, A, Stryker had actual knowledge of the '444 patent; and B, Stryker did not have a reasonable basis to believe, one, Stryker's T2 nail product did not infringe the '444 patent, or two, the '444 patent was invalid.

Ct. App. JA 0591. Nothing was said in the willfulness instruction about a duty of care.

2. The Verdict

The jury found that Stryker's T2 PHN infringed claims 1, 3-5, 10, 11, and 14-17 of the '444 Patent, and that Stryker's infringement was willful. Pet. App. 50a, 51a. The jury awarded damages of $458,853, consisting of lost profits and a reasonable royalty. Pet. App. 52a.

REASONS FOR DENYING THE PETITION

Stryker has attempted to portray this claim construction as a "dictionary definition" contest gone awry. According to Stryker, "the Federal Circuit chose the broader [dictionary definition], without regard to the public notice function of the claims." Pet. Br. at 24-25. Stryker is flat wrong. The Federal Circuit construed "transverse holes" without considering ***any*** dictionary definitions, relying instead upon the intrinsic record. Pet. App. 12a-17a. Stryker's "public notice" argument is particularly ironic, as two of its own lawyers immediately warned Stryker that its product would infringe Acumed's patent, also without reference to any dictionaries. Pet. App. 3a, 4a.

The Federal Circuit's opinion in *Seagate* likewise does not present a compelling reason to grant the Petition. The District Court already has held that Stryker willfully infringed under the *Seagate* standard. Moreover, at trial, the jury was instructed not under "the now defunct duty of care standard" as Stryker contends, but under a reasonableness test consistent with *Seagate*.

I. THE AFFIRMED CONSTRUCTION OF "TRANSVERSE HOLES" IS FULLY SUPPORTED BY THE INTRINSIC RECORD

The intrinsic record supports the Federal Circuit's construction of "transverse" in three different ways. First, the preferred embodiment discloses two different kinds of holes: (1) holes extending across the

butt portion, which the inventors called "transverse holes", and (2) a hole extending axially through the butt portion, which the inventors called "an axial bore." Second, the inventors expressly qualified the "transverse holes" in the preferred embodiment as being "perpendicular." Third, under the doctrine of claim differentiation, limiting the "transverse holes" in claim 1 to perpendicular holes would render dependent claim 15 meaningless.

Properly applying the canons of claim construction articulated in *Phillips*, the Federal Circuit correctly held that the '444 patent specification uses "transverse holes" more broadly than to simply represent perpendicularity. In the *Phillips* decision, the Federal Circuit "expressly rejected the contention that if a patent describes only a single embodiment, the claims must be construed as being limited to that embodiment . . . because persons of ordinary skill in the art ***rarely*** would confine their definitions of terms to the exact representations depicted in the embodiment." *Phillips* v. *AWH Corp.*, 415 F.3d 1303, 1323 (Fed. Cir. 2005) (emphasis added).[1] The *Phillips* court went on to state that, to avoid improperly importing limitations, "it is important to keep in mind that the purpose of the specification is to teach

[1] For example, in Stryker's own patent application claiming a nail purporting to improve upon the '444 patented nail, Stryker repeatedly refers to holes that extend across a nail perpendicularly and non-perpendicularly as "transverse." Ct. App. JA 0917-23.

and enable those of skill in the art to make and use the invention and to provide the best mode for doing so." *Id.* "Much of the time, upon reading the specification in that context, it will become clear whether the patentee is setting out specific examples of the invention to accomplish those goals, or whether the patentee instead intends for the claims and the embodiment in the specification to be strictly coextensive." *Id.*

The Federal Circuit correctly followed that methodology here, relying exclusively on the intrinsic record in doing so:

> The plain meaning of Claim 1 covers more than the particular embodiment shown in the figures. While the disclosed embodiment possesses "perpendicular" holes, the claim language covers all "transverse" holes – a word that does not necessarily imply right angles. Moreover, the patentees' description of their preferred embodiment itself implies a difference between the words "perpendicular" and "transverse." The written description states that Figure 2 "illustrates a plurality of transverse holes, each of which is . . . perpendicular to the portion of the nail axis at the butt portion 14 of the nail." '444 patent col. 2 lns. 56-59. This implies that a "transverse" hole need not be "perpendicular" – if it were, the patentee would not have needed to clarify that these holes, in addition to being transverse, were perpendicular to the nail axis. Just as in *Phillips*, where the asserted claim mentioned "steel baffles" and

hence "strongly implie[d] that the term 'baffles' does not inherently mean objects made of steel," 415 F.3d at 1314, this usage of language is strong evidence that the patentee considered "transverse" and "perpendicular" to have distinctly different meanings.

The intrinsic evidence of the specification therefore suggests that the patentees knew how to restrict their claim coverage to holes passing through at right angles. They could have used the word "perpendicular," as they did in discussing their preferred embodiment. Instead, they chose a different term that implies a broader scope. The intrinsic evidence does not indicate that one of skill in the art would believe the patentees meant "perpendicular" when they said "transverse." There is very little indication that the patentees considered perpendicularity important to their invention. The patentees tout the virtue of their preferred hole orientation only once, noting that "[t]he predictability of fracture modes makes the orientation of holes in the illustrated embodiment suitable *in most cases*." '444 patent col.4 ll.65-67 (emphasis added). Far from demonstrating that "the patentee[s] . . . intend[ed] for the claims and the embodiments in the specification to be strictly coextensive" with respect to this limitation, *Phillips*, 415 F.3d at 1323, this statement admits that the disclosed perpendicular hole orientation may not always be ideal. *See* '444 patent col.5 ll.2-4 (suggesting that, if holes are not "ideally situated, the surgeon may slightly rotate the

> nail to achieve a more favorable alignment"). Nowhere in the specification or the prosecution history do the patentees criticize or distinguish tilted, non-perpendicular holes.

Pet. App. 12a-14a.

Moreover, the nail of the illustrated preferred embodiment depicts holes (1) extending across the butt portion (holes 44a-d, highlighted in green below) and (2) extending axially through the butt portion (hole 32, highlighted in red below).

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FIG 2

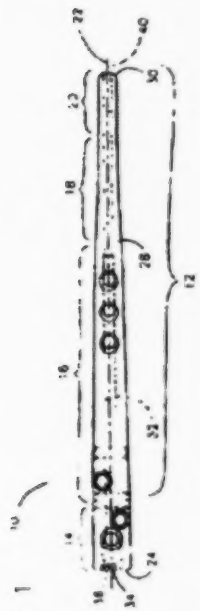


FIG 1

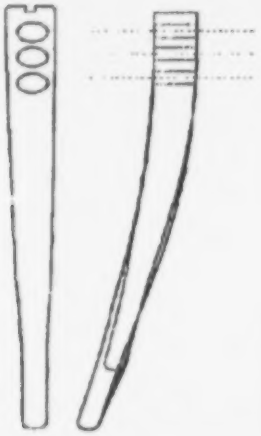
The axial hole (32) and transverse holes (44a-d) *all pass through the butt portion of the nail*. The patentees call the holes extending *across* the butt portion "transverse holes" and the hole extending *axially* "an axial bore." The modifier "transverse," therefore, is used by the patentees to distinguish holes across the butt portion from the axial hole extending through the center of the butt portion. Thus, the preferred embodiment *does* teach a "transverse hole" that is *across* the butt portion of the nail.

Finally, the doctrine of claim differentiation indicates further that the patentee intended "transverse holes" to cover more than perpendicular holes. "There is presumed to be a difference in meaning and scope when different words or phrases are used in separate claims. To the extent that the absence of such difference in meaning and scope would make a claim superfluous, the doctrine of claim differentiation states the presumption that the difference between the claim is significant." *Comark Comms., Inc.* v. *Harris Corp.*, 156 F.3d 1182, 1187 (Fed. Cir. 1998) (citation omitted). In *Comark*, the Federal Circuit explained that the defendant's proposed construction was improper because it "would render [dependent] claim 2 completely superfluous and redundant of claim 1." Similarly, Stryker's proposed construction of "transverse holes" would render dependent claim 15 completely superfluous and redundant of claim 1.

Claim 15 reads: "The nail of claim 1 wherein ***each*** of the transverse holes occupies a different plane" (A 0649, the '444 patent, col. 6, lns. 30-31)

(emphasis added). The only difference between claims 1 and 15 is that claim 1 also covers a nail in which each of the at least three transverse holes occupy a single plane. Stryker's proposed construction, however, renders dependent claim 15 superfluous because holes that must be perpendicular ***and*** "angularly offset from each other" ***always occupy a different plane***. The following illustrations should help clarify this point.

The illustration below shows that perpendicular holes in a single plane are never angularly offset from each other. The three parallel holes in a single plane are not within the scope of claim 1 because they cannot satisfy the angularly offset requirement. Therefore, limiting "transverse holes" to perpendicular holes will render dependent claim 15 meaningless.



On the other hand, dependent claim 15 has meaning under the construction adopted by the Federal Circuit. The illustration below shows transverse holes that extend across the butt portion of the

nail in a single plane *and that are angularly offset*. Dependent claim 15 would not cover the embodiment below, whereas independent claim 1 does cover the embodiment. Because the only limitation added by claim 15 has effect when "transverse" is given the ordinary meaning "across," there is a strong presumption that this is the correct meaning.

In summary, this case does not fall within either of the two hypotheticals framed by Stryker in its Questions Presented because there are "other indications of breadth affirmatively disclosed or taught" in the intrinsic record.

II. THE *SEAGATE* OPINION DOES NOT PROVIDE A COMPELLING REASON TO GRANT THE PETITION

Putting aside the question of whether the *Seagate* decision should even be given retroactive effect[2], the opinion does not provide a compelling reason to grant the Petition.

A. The District Court Already Has Found That Stryker's Willful Infringement Meets The *Seagate* Standard

Stryker quotes from this Court's opinion in *Lawrence* v. *Chater*, 516 U.S. 163 (1996) on the appropriateness of a grant of a writ of certiorari, grant and remand ("GVR"):

> [w]here intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine

---

[2] Stryker has made no argument whatsoever as to whether *Seagate* should be retroactively applied under the test of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). Acumed believes that the three-factor *Chevron Oil* test supports the denial of retroactive effect to the *Seagate* decision. For example, Stryker's decision to copy Acumed's invention was made years ago; application of a different legal standard cannot change that decision.

> the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.

516 U.S. at 167-68. Here, a recent development reveals just the opposite: the District Court has already found that infringement was willful under the *Seagate* standard. Specifically, on remand, the District Court held: "I can assure you that if I had applied that [Seagate] standard as articulated in August of 2007, I still would have found willfulness here on this record." Res. App. 3a.[3]

B. The District Court's Jury Instruction On Willfulness Is Substantially The Same As The *Seagate* Standard

Without any citation to the record, Stryker claims "In the present case, the now defunct duty of care standard was applied." Pet. Br. 28. *See also*, Pet. Br. 13 ("The jury was further instructed on the law of willful infringement based on the then-existing duty of due care standard."). Stryker is incorrect.

In any event, the jury instruction defining the standard for proving willfulness that was actually used by the District Court at trial does not differ materially from the standard set forth in the *Seagate* decision:

---

[3] Moreover, the Federal Circuit ordered an *en banc* consideration in *Seagate* on January 26, 2007. The Federal Circuit denied Stryker's petition for rehearing *en banc* on June 5, 2007. Pet. App. 37a.

> To prove willfulness, Acumed must persuade you it is ***highly probable*** that, A, Stryker had actual knowledge of the '444 patent and, B, Stryker had no ***reasonable*** basis to believe, one, Stryker's T2 nail product did not infringe the '444 patent, or two, the '444 patent was invalid.

Ct. App. JA 0591 (emphasis added). The duty of care was not even mentioned in the willfulness instruction.

The congruence between the District Court's instruction and the *Seagate* standard is striking. Both the District Court's instruction and the *Seagate* standard call for an objective assessment of the likelihood of infringement and validity. The District Court's instruction required the jury to find "no ***reasonable*** basis" for a belief in non-infringement or invalidity, just like the *Seagate* standard. *Seagate, supra,* 2007 U.S. App. LEXIS 19768 at **22-23 ("a patentee must show by clear and convincing evidence that the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent."). Both the District Court's instruction and the *Seagate* standard set forth an "objectively high" standard of proof. The District Court said "highly probable"; the *Seagate* standard calls for a "high likelihood." The jury in this case likewise expressly found willfulness by "clear and convincing evidence." Pet. App. 51a.

The actual bases for Stryker's willfulness are likewise consistent with the *Seagate* test. As the Federal Circuit explained:

> Here, substantial evidence supports a finding that Stryker ignored the November 2003 opinion letter to an extent sufficient to permit willfulness to be found in these circumstances. Most notable is the fact that two patent attorneys, Graalfs and Augustin, had at first strongly discouraged Stryker from marketing the infringing nail in the United States. Despite that advice, Stryker continued to push toward a United States market entry, filing its FDA application months before it received Augustin's revised legal advice. Additionally, Acumed presented evidence that Stryker copied its product, including that Stryker arranged to "confiscate" a hospital room chart instructing doctors in the use of Acumed nail.

Pet. App. 20a. The District Court also found:

> There is evidence in the record from which a rational juror could conclude Defendants set out on a deliberate course to eliminate their competition after Defendants were unable to buy Acumed outright. This evidence includes statements by Stryker that it planned to "attack competitors," to "eliminate the Polarus," and to "target existing Polarus accounts."

Pet. App. 64a.

In summary, the instruction given by the District Court does not materially differ from the *Seagate* standard. The evidentiary bases for Stryker's willful infringement also fit the *Seagate* standard.

CONCLUSION

For the foregoing reasons, the Petition for writ of certiorari should be denied.

Respectfully submitted,

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October 8, 2007 **Counsel of Record*

PARTIAL TRANSCRIPT OF PROCEEDINGS ON REMAND

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

ACUMED, LLC, a Delaware limited liability company, Plaintiffs, v. STRYKER CORPORATION, ET AL., Defendants.	Case No. CV-04-513-BR September 27, 2004 Portland, Oregon

TRANSCRIPT OF PROCEEDINGS

(Oral Argument)

BEFORE THE HONORABLE
ANNA J. BROWN, DISTRICT JUDGE

COURT REPORTER: AMANDA M. LeGORE, RDR, CRR, FCRR
U.S. COURTHOUSE
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* * *

[3] (Thursday, September 27, 2007; 1:30 p.m.)

PROCEEDINGS

THE COURT: I am sorry I had to defer the start of our hearing today. I appreciate your accommodation.

We are here in the matter of Acumed versus Stryker Corporation, and others, Civil No. 04-513, to take up the plaintiff's Motion for Entry of Permanent Injunction, which is Docket No. 231; the plaintiff's Motion for Enhancement of Damages, which is Docket No. 241; and the defendants' Motion to Strike certain allegations of fact and argument, which is Docket No. 247.

Would you please state your appearances for the record, Counsel.

For the plaintiff?

MR. VICKREY: Paul Vickrey and Chris Laney for the plaintiff.

THE COURT: Chris?

MR. LANEY: Laney.

THE COURT: Yes. Right. Thank you.

MR. LANEY: Thank you.

MS. HWANG: Sharon Hwang on behalf of defendants.

THE COURT: All right. Good afternoon.

* * *

[63] MS. HWANG: And the first one is sort of long.

This case, probably more so than any case I've ever been involved in, is a victim of timing, where there have been significant changes in the patent

laws just since this case was filed. We obviously had the eBay case. We had the Phillips decision. We had the Seagate decision, which is directly on point here.

Seagate – and we sent your Honor a letter the day after it came out on August 20th, 2007, Seagate is an en banc Federal Circuit decision where the Federal Circuit realized that all along it's been applying the wrong standard for willfulness. In fact they said the standard that the Federal Circuit has been using this whole time is more akin to negligence. And it's contrary to Supreme Court precedence to allow enhancement of damages on negligence.

And so they – they took the time to come up with a completely new standard. That standard is objective recklessness. And so now –

THE COURT: I can assure you that if I had applied that standard as articulated in August of 2007, I still would have found willfulness here on this record.

* * *